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IN THE

Supreme Court of the United States

October Term, 1961.

No. 813

J. ELROY McCAW and JAMES A. WOOTEN,

Petitioners,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF LOS ANGELES,

Respondent.

Petition for a Writ of Certiorari to the Supreme Court of the State of California.

BERNARD REICH,
328 South Beverly Drive,
Beverly Hills, California,
Attorney for Petitioners.

BERTRAM H. ROSS,
Of Counsel for Petitioners.

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vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF LOS ANGELES,

Respondent.

Petition for a Writ of Certiorari to the Supreme Court of the State of California.

Petitioners J. Elroy McCaw and James A. Wooten pray that a writ of certiorari issue to review the final judgment* of the California Supreme Court which denied them review of the California District Court of Appeal's denial of Petition for Writ of Mandate to review trial court's order denying their motion to quash process and to dismiss an action in which they as non-resident individuals were not served personally within the State of California.

*The judgment of the California Court is final on the issue of personal jurisdiction. (*Hartford v. Superior Court*, 47 Cal. 2d 447, 452 (1956); *cf., Madruga v. Superior Court of the State of California, etc.*, 346 U. S. 556, 557 (ftn. 1) (1954).

Opinion Below.

There were no opinions in any of the courts below.

Jurisdiction.

1. The judgment sought to be reviewed was entered on November 29, 1961.

2. On January 17, 1962, the time for filing petition for writ of certiorari was extended to and including April 28, 1962, by Honorable W. O. Douglas, Associate Justice.

3. The statutory provision believed to confer jurisdiction on this Court to review the judgment in question is 28 U. S. C. Section 1257(3).

4. The grounds upon which jurisdiction is invoked are that the California appellate courts in denying review and the California judiciary in assuming *in personam* jurisdiction of petitioners who were non-resident individuals and who were not personally served in California have decided important questions of federal law which have not been, but should be considered and settled by this Court, and have rendered a decision, on at least one of the questions involved, in a way in conflict with applicable decisions of this Court.

Questions Presented.

1. Did not the final judgment in effect deny petitioners discriminatorily and otherwise their right of review under the laws of California and in violation of the 14th Amendment to the United States Constitution?

2. Did not California violate petitioners' rights under the 14th Amendment to the United States Constitution in that the California Courts assumed jurisdiction *in personam* over non-resident individuals who had

not given prior consent to an action in tort, although they had given such consent to specific actions *ex contractu?*

3. Did not California violate petitioners' rights under the 14th Amendment to the United States Constitution in affording petitioners, one a citizen of Washington and the other a resident and citizen of New York, only 10 days to appear and defend with respect to the Summons and Complaint served in Los Angeles County, California, on petitioners' non-statutory but contractual agent (although a second summons was purportedly served outside of California by mail requiring response within 30 days)?

4. Did not California's assumption of jurisdiction *in personam* over nonresident individuals who had given *prior* consent violate petitioners' rights under the 14th Amendment to the United States Constitution?

Constitutions and Statutes Involved.

(Printed in Appendix)

They are:

1. U. S. Constitution, 14th Amendment, §1
2. California Constitution, Article 6, §2.
3. California Constitution, Article 6, §4.
4. California Constitution, Article 6, §4b.
5. California Constitution, Article 6, §24.
6. California Code of Civil Procedure, §416.1.
7. California Code of Civil Procedure, §416.3.
8. California Code of Civil Procedure, §407, subdiv. 3.
9. California Code of Civil Procedure, §963, subdiv. 1.

Statement of the Case.

The record in this case consists only of the proceedings in the California appellate courts. Under California procedure, the proceedings in the trial court never reached the appellate courts because an alternative writ of mandate was refused (see *infra*).

However, the facts are not in dispute and appear for the most part in the printed "Petition for Hearing" filed with the California Supreme Court, certified to this Court. The undisputed facts follow;

On April 9, 1961, the Union Bank (of Los Angeles, California) entered into an agreement with petitioners, among others, in which Union Bank extended credit to others on the guaranty of petitioners.

Petitioner McCaw was and is a resident of Seattle, Washington (but works mostly in New York). Petitioner Wooten was and is a resident of New York. Paragraph 20 of the agreement, however, provides:

> "National, Howard, McCaw, Wooten, NOKNY and NOKLA and each of them, for the express benefit of Union, hereby agree and by this instrument do consent to the jurisdiction of the courts of the State of California; in any action at law or in equity which may hereafter be commenced by Union arising out of this agreement or arising out of any loan or guaranty transaction heretofore made by and between Union and any of the named parties. Said parties further expressly agreed that service of process may be effected upon them and each of them by any one of the following means:

(a) By personal service of process upon Bertram H. Ross, 453 South Spring Street, Los Angeles, California, who is hereby irrevocably appointed and designated by said persons as their agent for service of process in the State of California; or

(b) By personal service upon the Secretary of State of the State of California. Said persons hereby agree to execute such documents as may be required by said Secretary of State to constitute effective designation of him as an agent for service of process; or

(c) By personal service upon Theodore Sirene of the Corporation Trust Company, 510 South Spring Street, Los Angeles, California, or if at the time that said process is to be served, said Sirene no longer holds the position now held by him, then upon such person as may then occupy such position for Corporation Trust Company, or

(d) Personal service upon the aforesaid named parties or any of them within or outside of the State of California; or

(e) By any other means which, under applicable law, constitutes effective personal service.

It is expressly agreed that in any event and regardless of which of the aforesaid means may be utilized by Union, Union will also serve the aforesaid persons, and each of them by mailing a copy of said process, postage prepaid, certified United States Mail, with return receipt requested, to the following addresses:

Fried, Beck, Tannenbaum, Ruggieri & Field
515 Madison Avenue
New York 22, New York

James A. Wooten
7 Central Park West
New York 23, New York

J. Elroy McCaw
The Highlands
Seattle, Washington

Robert A. Howard
3440 Wilshire Boulevard
Los Angeles, California."

On September 5, 1961, Union Bank, the real party in interest, filed its Complaint, summons being issued on the same day, and service being made purportedly on defendants and petitioners on September 5, 1961, by serving Bertram H. Ross personally in Los Angeles County and by mailing copies of the Summons and Complaint to defendants and petitioners respectively to Seattle, Washington, and New York City, New York, purportedly pursuant to the above quoted provisions of the agreement.

The Complaint attempts to allege three causes of action; the first in declaratory relief regarding three writings [an agreement of April 9, 1961, Ex. B, and two guaranty agreements, Exs. A and C]; the second for non-payment of a note; and the third for conspiracy to defraud. This Third Cause of Action alleges on information and belief that the defendants conspired with a debtor who is not sued and a third party who is not sued to cause the debtor and the third party to submit false accounts receivable, damaging plaintiff in

the sum of $1,931,000.00 general damages, and $500,000.00 punitive and exemplary damages.

Defendants and Petitioners herein timely filed their notice of motion for an order to quash service of summons or in the alternative to dismiss the Third Cause of Action upon the ground that the Respondent lacked jurisdiction over the persons of said defendants and Petitioners in that the defendants were non-residents of the State of California; that service was not made upon them personally in this state; that it was against the public policy of this state to make nonresident individuals defendants amenable to process here notwithstanding their consent prior to the arising in plaintiff of a cause of action; that the nonresident defendants were afforded only 10 days to appear and defend and, therefore, would be deprived of due process of law; and that with respect to the Third Cause of Action for conspiracy to defraud there was no prior consent rendering these nonresident individual defendants amenable to process in this state.

Among other things, Petitioners raised the federal constitutional question of due process in the trial court.

The said Motion to Quash was thereafter argued by the respective parties; it was heard as a question of law only; and an order was entered by the trial court on the 13th day of October, 1961, denying said motion including the alternative for dismissing the Third Cause of Action for Conspiracy to Defraud.

On October 25, 1961, defendants timely filed their petition for Writ of Mandate with the Clerk of the District Court of Appeal, Second District, to compel the respondent to enter an order quashing the purported service of summons on said defendants, or in

the alternative to dismiss the Third Cause of Action herein.

Petitioners raised the federal constitutional question in the District Court of Appeal (*e.g.*, Petition for Writ of Mandate, Par. IV, pp. 3-4, Par. VIII, p. 6, Point II, pp. 4-8, Point III, pp. 8-11, Conclusion, p. 11). On November 2, 1961, said Court without opinion denied the petition.

Its judgment or order simply read:

"The Court:

Petition for Writ of Mandate Denied.

Shinn, P.J."

Thereafter, petitioners timely filed their Petition for Hearing in the California Supreme Court, pointing out in addition to what has been set forth above that the validity of the order below could not be raised by appeal or saved in any pleading since any pleading would forever waive the question of jurisdiction; that serious constitutional questions would arise if petitioners were not entitled to a review of the trial court's order; and that petitioners, therefore, under Section 416.3 of the Code of Civil Procedure, were entitled as a matter of statutory right to an alternative writ.

Petitioners prayed for hearing, but that first an alternate Writ of Mandate be issued (which would have been tantamount to leave to appeal and would have brought up the record in the trial court), and that thereafter a Peremptory Writ be issued command-

ing the trial court to enter an order granting the motion to quash or, in the alternative, dismiss the Third Cause of Action in tort.

Again, Petitioners raised the federal constitutional question even to anticipating the federal question which arose by reason of the denial of hearing or review (*e.g.*, Petition for Hearing, Pars. IX and X, p. 6, Points and Authorities, pp. 9, 10, 13, 16, 17-20, 20-21).

The California Supreme Court denied the petition and in effect denied any review of the trial court's judgment.

The Judgment or order of the California Supreme Court read:

"Petition for hearing Denied.

Gibson
Chief Justice".

On January 4, 1962, Petitioners submitted to the California Supreme Court a proposed certificate that Petitioners had raised federal questions. The Clerk of said court returned said certificate, orally advising counsel that the Court does not make such certifications.

Unless this Court grants review, admittedly the Petitioners must file a pleading and forever waive the jurisdictional issue under the laws of California (*Hartford v. Superior Court*, 47 Cal. 2d 447).

REASONS FOR GRANTING THE WRIT.

1. The Case Presents an Important Federal Question Concerning Petitioners' Right Under the 14th Amendment to Have Reviewed by the California Appellate Courts a Trial Court's Order Disposing Finally a Jurisdictional Issue —an Important Federal Question Either Not Settled by This Court or Which Has Been Decided in Conflict With the Applicable Decisions of This Court.

Petitioners concede that the 14th Amendment to the United States Constitution does not *per se* give them any right to appeal: They urge however that under the circumstances of this case they have been deprived of "the equal protection of the laws" by denial of their right of review either by appeal or by writ.

The California Constitution grants appellate jurisdiction to the District Courts of Appeal (Art. 6, §4b) and the Supreme Court (Art. 6, §4) from the Superior courts. Section 963, sub. 1, of the Code of Civil Procedure provides for appeal from a "final judgment" in an action filed in the superior court.

An order denying a motion to quash as distinguished from an order granting such motion is not an appealable final judgment. The remedy after denial has always been by writ.

In California, the writ is either alternative or peremptory. The alternative writ is only an order to show cause; the peremptory writ is the final order (C. C. P. Sec. 1087).

In effect, the alternative writ is tantamount to granting leave to appeal. Thus the California Constitution requirement (Art. 6, §24) that the appellate court must

state reasons for its decision applies only to peremptory writs and not to alternative writs.

Funeral Directors v. Bd. of Funeral Directors, 22 Cal. 2d 104, 106-107 (1943).

Prior to 1955, the writ in the circumstances of this case was only generally statutory, more or less a codification of common law. Since 1955, the writ of mandate in the circumstances is expressly statutory (C. C. P. Sec. 416.3), and is the sole route petitioners must follow if they are not to waive the jurisdictional question.

In *Hartford v. Superior Court*, 47 Cal. 2d 447 (1956), it was stated:

> "The obvious purpose of sections 416.1 and 416.3 is to permit a defendant to challenge the jurisdiction of the court over his person without waiving his right to defend on the merits by permitting a default to be entered against him while the jurisdictional issue is being determined. (See 1 Witkin, California Procedure, 1955 Statutory Supplement, 17-19.) To achieve this purpose, when relief has been denied in the trial court, it is necessary *that relief be sought* in the appellate court before the time to plead has expired. Otherwise the defendant would be compelled to elect between permitting the entry of a default or waiving the jurisdictional issue by pleading to the merits." (Emphasis added.)

If all the said statute was intended to do was to permit petitioners *to apply* for leave to review (alternative writ), then the decision of the Supreme Court denying leave meant they had to submit to the jurisdiction of the California Courts and could not appeal on jurisdictional grounds from the ultimate judgment.

Thus, petitioners by judicial construction have been denied appeal under the California constitutional (Arts. 4 and 6) and statutory provisions (C. C. P. Sec. 963.1) and "appeal by writ" under express statutory provisions (C. C. P. Sec. 416.3).

It should be noted that the United States Constitution may be violated by a state judiciary in the course of construing an otherwise valid state statute. Thus, since petitioners' only remedy was by writ, the denial of even the alternative writ deprived them of constitutional safeguards.

Cf:

Brinkerhoff—Faris Trust & Savings Co. v. Hill, 281 U. S. 673, 679, 680 (1930).

This Court is not bound by a state supreme court's construction of state law in face of petitioners' claim that such construction denies them rights guaranteed under the 14th Amendment.

Scott v. McNeal, 154 U. S. 34, 45-46 (1894).

In *Williams v. Kaiser,* 323 U. S. 471 (1945), involving a state court's dismissal of a petition for a writ of habeas corpus by a defendant claiming violation of the 14th Amendment by the state court's denial of counsel under state statutes, this Court stated (pp. 473-474):

> ". . . But the right to counsel in cases of this type is a right protected by the Fourteenth Amendment of the federal Constitution. The question whether that federal right has been infringed is not foreclosed here, even though the action of the state court was on the ground that its statute requiring the appointment of counsel was not violated. (Citing case.) And Missouri has not suggested in the

argument before this Court that it provides a remedy other than habeas corpus for release from a confinement under a judgment of conviction obtained as a result of unconstitutional procedure. Neither in the briefs nor in oral argument did Missouri suggest that its habeas corpus procedure (citing statute) is not available in this situation.

"The petition for habeas corpus was denied without requiring the State to answer or without giving petitioner an opportunity to prove his allegations. And the allegations contained in the petition are not inconsistent with the recitals of the certified copy of the sentence and judgment which accompanied the petition and under which petitioner is confined. Hence we must assume that the allegations of the petition are true. (Citing case.) Read in that light we think the petition makes a prima facie showing of denial of the constitutional right."

Moreover, we believe that the thrust of this Court's decisions in two cases is that the equal protection clause of the 14th Amendment is violated by discriminatory denial of appeal (a) *per se* and (b) under state statute.

Griffin v. Illinois, 351 U. S. 12 (1956) (Review denied below solely for inability to pay for transcript);

Dowd v. United States, 340 U. S. 206 (1951) (Discriminatory denial below of statutory right to appeal).

We urge that these are the applicable decisions with which the judgment below conflicts.

We recognize that the above cases are restricted to the facts more so than in other cases. Hence we argue

that in any event this Court has not decided, but should decide, the important federal question as to whether nonresident individuals are not deprived of due process or equal protection when the state forum deprives them of the right to appeal at any time on the jurisdictional question; and when although the state statute provides a remedy by writ, they are denied even the alternative writ without the record in the trial court and without hearing.

To any counter-argument that the mere filing of the petition and subsequent summary denial constitutes review, we would say (1) due process and equal protection must mean meaningful review (*Cf. Chessman v. Teets*, 354 U. S. 156 (1957)) and (2) the question is important enough to have a pronouncement from this Court.

2. The Case Presents an Important Federal Question Concerning the Violation of Petitioners' Rights Under the 14th Amendment in That the California Courts Assumed Jurisdiction in Personam Over Non-Resident Individuals Who Had Not Given Prior Consent to an Action in Tort, Although They Had Given Such Consent to Specific Actions ex-Contractu—an Important Federal Question Not Settled by This Court.

The complaint filed in the trial court alleged three causes of action, the first two in contract, the third for conspiracy to defraud.

This Third Cause of Action alleges on information and belief that the defendants conspired with a debtor who is not sued and a third party who is not sued to cause the debtor and the third party to submit false

accounts receivable, damaging plaintiff in the sum of $1,931,000.00 general damages, and $500,000.00 punitive and exemplary damages (Petition for Hearing, pp. 5, 6).

Incidentally, punitive and exemplary damages are awarded in California only in cases "*not* arising from contract" (Civ. Code, Sec. 3294).

Petitioners urged without success below that since petitioners at no time gave any consent to being sued in tort in California, the Third Cause of Action, Conspiracy to Defraud, should have been dismissed for want of jurisdiction.

It is elementary constitutional law that a state cannot ordinarily acquire jurisdiction *in personam* over nonresident defendants without personal service within that state (*Pennoyer v. Neff*, 95 U. S. 714). We urge therefore that petitioners were deprived of due process in having to appear and defend from outside of California a cause of action to which they had not given their prior consent.

Apparently, the only case anywhere which could be cited as remotely applicable affirmatively was cited by plaintiff, to wit—*Adam v. Saenger*, 303 U. S. 59 (1938). There this Court held that a judgment *in personam* could constitutionally be rendered in a *cross-action* against a nonresident plaintiff who filed a complaint in the forum.

Plaintiff argued below that "by a parity of reasoning, the same conclusion applies here. Petitioners having properly subjected themselves to the jurisdiction of the California courts with reference to the first two causes of action, due process is not offended. . . ."

(Answer in Supreme Court of Real party in Interest, p. 15).

Unfortunately for plaintiff's position, however, defendants did not subject themselves to the jurisdiction as did the plaintiff in *Adam v. Saenger, supra.*

Paragraph 20 of the contract [printed in full in the certified record in the Petition for Hearing, Par. III, pp. 2 through 4, and herein *supra* under Statement of the Case] which purports to give consent to service provides that the companies and persons named, including the defendants here, consent to the jurisdiction in any action at law or in equity "arising out of this agreement or arising out of any loan or guaranty transaction."

It is clear that this is *contract* language; nor can "transaction" be taken alone as argued below (Answer, *supra*, p. 14) in the face of the adjective "guaranty."

Unquestionably, the Third Cause of Action is in tort. Plaintiff concedes this by seeking exemplary damages under Civil Code Section 3294 which expressly excludes actions arising from contract.

Moreover, the Third Cause of Action for Conspiracy to Defraud arises neither out of the contract, nor loan nor guaranty transactions. It is not even an action to set aside the contract, loan, or guaranty transactions, or an action for fraud in the inducement to make the contract. It is a plenary action not bearing directly on the contract, the loans, or the guaranty transactions. It alleges a conspiracy in that these defendants agreed to have third parties submit false invoices to plaintiff (Petition for Hearing, pp. 5, 9, 17).

This is a tort not dependent on any contract or loan made to these defendants. If plaintiff has such a cause,

of action against these defendants, it could have been brought alone and without reference to the first two causes of action in contract.

Plaintiff argued below that (1) if the trial court had jurisdiction below with respect to the first two causes, it had jurisdiction below with respect to the third cause since under C. C. P. 427, all three could be joined now or later and that defendants admit this by moving for dismissal of the third cause instead of moving to quash; and (2) there is here a designation of an agent for services of any and all actions including all manner of tort.

The first argument begs the question which is one of jurisdiction, not power or procedure. The statutory rules of joinder cannot expand the contractual consent needed for jurisdiction.

It is true that the *alternative* motion was to dismiss, not to quash; but this was made necessary by plaintiff's procedure. If the trial court had jurisdiction of the first two causes, it is because defendants had given consent and service cannot therefore be quashed as there is no way of splitting the service on the motion to quash. Jurisdiction of the Third Cause of Action is also claimed on the basis of consent. If the trial court ruled there was no consent to jurisdiction of the Third Cause of Action, it had no jurisdiction and the only way to reach the question was not on a motion to quash service in this cause, but on a motion to dismiss the cause over which it had no jurisdiction.

Plaintiff's second argument that the designation of an agent makes defendants amenable to process must also fail. Designation of agents by nonresident indi-

viduals must depend also on consent, there being no statutory authority.*

The consent here is set forth in Paragraph 20 of the contract and is limited, as we have seen, to actions arising out of the agreement, loans, or guaranty transactions. Service on Mr. Ross or by mail was one of several means of making service pursuant to the consent. *The designation of an agent was not a separate and unconnected part of the consent.*

However, plaintiff argued below that apart from contract, defendants' irrevocable designation of Mr. Ross as agent was sufficient to make these defendants amenable to process for any purpose and for any cause of action. If, however, statutes providing in a sense extraterritorial jurisdiction must be strictly construed (*Chesin v. Superior Court,* 142 Cal. App. 2d 360), it would seem to follow that writings providing for substituted service should be construed at least no less strictly.

Please note that with respect to this argument, that is, that the appointment of an agent by nonresident individuals is sufficient *per se,* plaintiff is bound by the applicable 10 day period for the defendants to respond.

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*We have been able to find statutory authority for designation of agents by non-resident individuals only in Section 1018 of the California Code of Civil Procedure which provides for the designation of natural persons in this state to receive service of process by foreign corporations or non-resident individuals incurring tax liabilities in California or resident individuals who incur any liability to the State of California under any tax law of the state and who thereafter leave the state.

As we will see, this is insufficient notice to the defendants to appear and defend and is in violation of their constitutional rights.

There being no opinions in any of the courts below, we have no way of knowing which of plaintiff's arguments found acceptance with the California judiciary. To any argument to this Court, therefore, that conceivably the question turns on the construction of a contract or a question of fact (an argument with which we cannot agree and perhaps which we should not even anticipate), we think it sufficient to cite a case in this Court which involved the question of constitutional (sovereign) immunity from state taxation and the construction of a contract between the Navy and a private contractor. This Court there spoke of the "long course of judicial construction which establishes as a principle that the duty rests on this Court to decide for itself facts or constructions upon which federal constitutional issues rest".

Kern-Limerick Inc. v. Scurlock, 347 U. S. 110, 121 (1954).

Cf:

Board of Liquidation v. Louisiana ex rel. Wilder, 179 U. S. 622 (1901).

In the last mentioned case, this Court held it was its duty to exercise independent judgment as to the nature and scope of a contract when its jurisdiction is invoked by the claim that the state court's interpretation violates the 14th Amendment.

3. The Case Presents an Important Federal Question Concerning the Violation of Petitioners' Rights Under the 14th Amendment in That the California Laws Incorporated by the Contract Did Not Afford Defendants Reasonable Notice to Appear and Defend—an Important Federal Question Either Not Settled by This Court or Which Has Been Decided in Conflict With the Applicable Decisions of This Court.

It is likewise elementary constitutional law that non-resident defendants must be afforded reasonable time to appear and defend.

Mullane v. Central Hanover, etc., 339 U. S. 306, 314 (1950);

Roller v. Holly, 176 U. S. 398, 408 (1900);

Wuchter v. Pizzutti, 276 U. S. 12, 24 (1928).

In the instant case, one summons was served in Los Angeles County on defendants' contractual agent requiring response within 10 days and another was served by mail outside of the county and state requiring response within 30 days.

The fact that plaintiff's counsel considered the 30 day period or was agreeable to extending time to appear and defend [Exh. 4 to Answer to Petition in District Court of Appeal] does not meet the constitutional objective of due process. It is the *summons* which must afford the reasonable time (*Mullane, Roller, Wuchter, supra*).

It would seem obvious that defendants ("served" in two ways, one requiring response in 10 days and one requiring response in 30 days) must assume that the plaintiff considers each service effective, and that while

the *choice* may be with plaintiff as to when to take the default, the defendants have no choice, but must respond within the period applicable by any purported valid service. It will be noted that Paragraph 20 of the contract and set forth in the Petition herein provided for the mailing only as an *additional* method, apparently for defendants' benefit.

Plaintiff cannot stultify itself. It made personal service here in Los Angeles of a summons which required them to appear "within 10 days after the service on you of this summons, if served within the County of Los Angeles." True, the summons also read "or within 30 days after service elsewhere." The undisputed fact is that one summons was served within the County of Los Angeles.

As has been noted, the interpretation or generosity of plaintiff's counsel cannot resolve constitutional questions or requirements and that any confusion or ambiguity must be resolved against plaintiff in view of its burden of proof [*Confidential, Inc. v. Superior Court*, 157 Cal. App. 2d 75, 79 (1958).]

We urge that the 10 day period was applicable and that 10 days for nonresidents to appear and defendant was unreasonable and unconstitutional.

Roller v. Holley, 176 U. S. 398, 413, held five days insufficient and cited statutes throughout the United States affording much more notice.

In *Goodrich v. Ferris*, 214 U. S. 71, 80, the Supreme Court did not hold that 10 days' notice in a California probate distribution *in rem* proceeding was unreasonable, but expressly distinguished that case from the *Roller* case, *supra*, on the ground that the *Roller* case involved an *original process*.

To sum up the constitutional requirement: the United States Supreme Court approved the 1900 case of *Roller, supra,* and the 1908 case of *Goodrich. Roller* held five days to be insufficient. *Goodrich* held 10 days to be sufficient only in a probate distribution and in a proceeding *in rem*—but not in a case involving original process.

In this case the agreement (Par. 19) provides that it shall be construed and interpreted in accordance with the laws, both statutory and decisional, of California. In Paragraph 20 of the agreement defendants consented to the jurisdiction of the Courts of California and that service of process might be effected upon them by personal service upon Bertram H. Ross in Los Angeles, in effect requiring them to appear and defend in 10 days (C. C. P. Sec. 407, subd. 3).

And even if plaintiff can ignore that incorporation of California statutory law, and rely on the agreement alone, it faces the insurmountable rule that parties cannot by contract reduce time requirements unreasonably. For example, that the Statute of Limitations cannot be shortened unreasonably, please see:

> *31 Cal. Jur. 2d* 435, Lim. of Actions, Sec. 7;
> *Breeland v. Southern Pacific Company,* 231 F. 2d 576, 578 (C. A. 9, 1955).

The real party in interest argued below that by also making service by mail the 30 day period to appear and defend became applicable. When defendants argued that because of the service in this state personally on the agent defendants were called upon to defend within 10 days, the trial court remarked that this was defendants' problem. We cite this exchange only to point up that if there is a dilemma it cannot be used to deprive defendants of their constitutional rights.

One final point with respect to the constitutional sufficiency of the 10 day period. It was argued below that with airplanes 10 days is more than sufficient to appear and defend. In answer we think it sufficient to say that it is not just the travel time* between Washington and New York, on the one hand, and California, on the other, which is the determining factor. The constitutional test is both "appear and defend" and that means the retaining of an attorney, making him sufficiently acquainted with the facts so that he can appear and defend intelligently. This must be why California statutes provide 30 days for services outside the county (*e.g.*, see C. C. P. 407, subs. 3); and even within California, defendants or respondents are afforded time advantages in discovery legislation. Please see, for example, Section 2016 of the California Code of Civil Procedure which gives to the defendant a 20 day headstart on giving notice of depositions. Compare please the Notes of the Advisory Committee on a similar federal rule reported in 28 U. S. C. A. Rule 26, page 289, as follows:

> "* * * The retention of the requirement where a deposition is sought by a plaintiff within 20 days of the commencement of the action protects a defendant who has not had an opportunity to retain counsel and inform himself as to the nature of the suit * * *."

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*As in *Roller, supra*, 176 U. S. at p. 408, the time specified "makes no allowance for accidental delays in transit."

4. The Case Presents an Important Federal Question Concerning the Violation of Petitioners' Rights Under the 14th Amendment in That the California Courts Assumed Jurisdiction in Personam Over Non-Resident Individuals Based Only on Prior Consent, Which Question This Court Has Not Settled.

At the outset of this point, we must concede that the few authorities outside of California which have discussed the quesion have ruled or pronounced against the position of the petitioners here.

In California, beginning with *De La Montanya v. De La Montanya*, 112 Cal. 101, and prior to 1940 it had been uniformly held by the California Courts that they could not acquire jurisdiction *in personam* over non-resident defendants without personal service within the state on said defendants.

These decisions were the result of narrow interpretation of *Pennoyer v. Neff*, 95 U. S. 714.

However, in 1940, the United States Supreme Court in *Milliken v. Meyer*, 311 U. S. 457, in deciding with respect to a *statute* "liberalized" the *Pennoyer* Rule. The result of *Milliken* was to permit substituted service *under statute*, provided the statute afforded reasonable opportunity to appear and defend.

For the history of the California decisions and the fact that these statutes giving in a sense extra-territorial jurisdiction must be strictly construed, this Court is referred to—

Chesin v. Superior Court, 142 Cal. App. 2d 360 (1956).

Against this background of reluctantly expanding service and then only by statute, we searched for decisions directly bearing on our question, that is, non-statutory prior consent. We could find only one case—

Frey & Horgan Corp. v. Superior Court, 5 Cal. 2d 401 (1936).

The California Court there after accepting the long established rule against *in personam* jurisdiction of non-residents not personally served in this jurisdiction, held that prior consent was present here by contract reference to the *Arbitration Laws* of this State. In other words, the parties had submitted themselves to a forum outside of the court and in accordance with statutory rules of service in arbitration cases.

That the *Frey* case is considered an arbitration-jurisdictional matter, please see the Reporter's headnotes in that case, 38 California Law Review, and Courts, Key 25 of West's Cal. Digest.

We deem it abhorrent to the public policy of California and violative of State and Federal Constitutions to require *prior* consenting defendants residing long distances from California and not doing business there and who are not the primary obligors to be required to appear and defend in what is to them a foreign forum.

Conclusion.

Petitioners' only and last recourse to save serious constitutional objections to submitting to the jurisdiction of California is to seek out this writ. Unless the petition is granted, this case raising serious jurisdictional and constitutional questions (the first three are of first impression anywhere) will have been decided by a

single California Judge without appellate review in the otherwise enlightened State of California.

California should not be permitted in such offhand fashion to assume *in personnam* jurisdiction over citizens of other states.

The Petition herein should be granted.

Respectfully submitted,

BERNARD REICH,
Attorney for Petitioners.

BERTRAM H. ROSS,
Of Counsel for Petitioners.

APPENDIX.

1. U. S. Constitution, Amendment XIV, Section 1.

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

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2. California Constitution, Art. 6, §2.

"* * * In the determination of causes, all decisions of the court in bank or in departments shall be given in writing, and the grounds of the decision shall be stated."

---

3. California Constitution Art. 6, §4.

§4. Supreme Court; jurisdiction.

Sec. 4. The Supreme Court shall have appellate jurisdiction on appeal from the superior courts in all cases in equity, except such as arise in municipal or justices' courts; also, in all cases at law which involve the title or possession of real estate, or the legality of any tax, impost, assessment, toll, or municipal fine also, in all such probate matters as may be provided by law; also, on questions of law alone, in all criminal cases where judgment of death has been rendered; the said court shall also have appellate jurisdiction in all cases, matters and proceedings pending before a District Court of Appeal, which shall be ordered by the Supreme Court

to be transferred to itself for hearing and decision, as hereinafter provided. The said court shall also have power to issue writs of mandamus, certiorari, prohibition, and habeas corpus, and all other writs necessary or proper to the complete exercise of its appellate jurisdiction. Each of the justices shall have power to issue writs of habeas corpus to any part of the State, upon petition by or on behalf of any person held in actual custody, and may make such writs returnable before himself or the Supreme Court or before any District Court of Appeal, or before any justice thereof, or before any Superior Court in the State, or before any judge thereof.

---

4. California Constitution, Art. 6, §4b.

§4b. District Courts of Appeal; jurisdiction.

Sec. 4b. The District Courts of Appeal shall have appellate jurisdiction on appeal from the superior courts (except in cases in which appellate jurisdiction is given to the Supreme Court) in all cases at law in which the superior courts are given original jurisdiction; also, in all cases of forcible or unlawful entry or detainer (except such as arise in municipal, or in justices' or other inferior courts); in proceedings in insolvency; in actions to prevent or abate a nuisance; in proceedings of mandamus, certiorari, prohibition, usurpation of office, removal from office, contesting elections, eminent domain, and in such other special proceedings as may be provided by law; also, on questions of law alone, in all criminal cases prosecuted by indictment or information, except where judgment of death has been rendered.

The said courts shall also have appellate jurisdiction in all cases, matters, and proceedings pending before

the Supreme Court which shall be ordered by the Supreme Court to be transferred to a District Court of Appeal for hearing and decision. The said courts shall also have power to issue writs of mandamus, certiorari, prohibition and habeas corpus, and all other writs necessary or proper to the complete exercise of their appellate jurisdiction. Each of the justices thereof shall have power to issue writs of habeas corpus to any part of his appellate district upon petition by or on behalf of any person held in actual custody, and may make such writs returnable before himself or the District Court of Appeal of his district or before any superior court within his district, or before any judge thereof.

---

5. California Constitution, Art. 6, §24.

"* * * In the determination of causes all decisions of the Supreme Court and of the District Courts of Appeal shall be given in writing, and the grounds of the decision shall be stated."

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6. California Code of Civil Procedure, §416.1.

§416.1. Motion to Quash Service for Lack of Jurisdiction. Any defendant or cross-defendant upon whom service of summons has been made may serve and file, on or before the last day on which he is required to plead, or within such further time as the court may for good cause allow, a notice of motion to quash the service of summons, upon the ground of lack of jurisdiction of the court over him. The notice shall designate as the time of making such motion a date not more than 10 days following the filing of such notice of motion. In the event of the service and filing of such motion, the time of the moving party to plead to

the complaint or cross-complaint shall be extended, and no default may be entered against him, until the expiration of 10 days following service upon him of written notice of entry of any order of the court denying the motion. Upon good cause being shown, the court may extend the latter 10-day period for an additional period not exceeding 20 days. Neither an application to the court by any defendant or cross-defendant for an extension of time within which to plead, nor the granting of such extension nor entering into a stipulation of the parties for such extension, shall constitute a general appearance by said defendant or cross-defendant.

7. California Code of Civil Procedure, §416.3.

§416.3 Writ of Mandate on Denial of Motion to Quash.—If a motion of a defendant or cross-defendant to quash service of summons, as provided in Section 416.1 of this code, is denied by the court, he may, before pleading, and within 10 days after service upon him of written notice of the order of the court denying the motion, or within such additional time not exceeding 20 days as the court may allow, petition an appropriate appellate court for a writ of mandate directed to the court wherein the action or proceeding is pending requiring the entry of its order quashing the service of summons. If he shall thereupon serve upon the adverse party and file with the clerk of the latter court a notice that he has petitioned for such writ of mandate, his time to plead shall be extended, and no default may be entered against him, for a period of 10 days following written notice of the final judgment in the mandamus proceeding, which time for good cause may be

extended by the court for an additional period of not to exceed 20 days.

---

8. California Code of Civil Procedure, §407.

"*Direction, Signing and Sealing Summons.*—The summons must be directed to the defendant, signed by the clerk or *judge*, and issued under the seal of the court. It must contain"

* * *

"3. A direction that the defendant appear and answer the complaint within 10 days, if the summons is served within the county in which the action is brought, *or* within *30* days, if served elsewhere, * * *"

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9. California Code of Civil Procedure, §963.

"*Appealable Judgments and Orders.*—An appeal may be taken from a superior court in the following cases:

1. From a final judgment entered in an action, or special proceeding, commenced in a superior court * * *"

IN THE

Supreme Court of the United States

JOHN F. DAVIS, CLERK

Office-Supreme Court, U.S.
FILED
MAY 14 1962
JOHN F. DAVIS, CLERK

October Term, 1961.
No. 813

J. ELROY McCAW and JAMES A. WOOTEN,
Petitioners,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF LOS ANGELES,
Respondent,

UNION BANK, a corporation,
Real Party in Interest.

BRIEF OF REAL PARTY IN INTEREST IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

LOEB AND LOEB,
HOWARD I. FRIEDMAN,
523 West Sixth Street,
Los Angeles 14, California,
Attorneys for Real Party in Interest.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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IN THE

Supreme Court of the United States

October Term, 1961.
No. 813

J. ELROY MCCAW and JAMES A. WOOTEN,
Petitioners,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF LOS ANGELES,
Respondent,

UNION BANK, a corporation,
Real Party in Interest.

BRIEF OF REAL PARTY IN INTEREST IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Preliminary Statement.

Petitioners seek certiorari with respect to four questions which they claim involve "important questions of Federal law" requiring determination by this Court. [Petition, p. 2.]* As we shall see, none of the ques-

*The certiorari is sought to be directed to the California Supreme Court. Since that court merely denied a petition for hearing after a decision by the District Court of Appeal, it is not the proper court to which certiorari should be directed. The proper court is the District Court of Appeal. [*Hammerstein v. Superior Court*, 341 U. S. 491, 492 (1951).]

tions are "of substance" in the sense that this Court's power of discretionary review is warranted.

The elementary teaching of Rule 19 of this Court's rules is that there must be "special and important reasons" for the exercise of this Court's discretionary review power. That standard implies "a reach to a problem beyond the academic or the episodic". [*Rice v. Sioux City Cemetery*, 349 U. S. 70, 74 (1955).] There is nothing in the Petition showing grounds of such importance—as distinguished from importance to the litigants. Indeed, the most that petitioners assert is that the questions have not been previously decided by this Court and that, therefore, grounds exist for the granting of the Petition. [Petition, pp. 13-14.] Many intellectually interesting questions of law have not been decided by this Court. But that alone does not make the questions appropriate for decision by this Court. Each of the questions asserted by petitioners involves elementary principles of law. Each is well-settled and requires no further determination by this Court.

Moreover, the alleged Federal questions were not raised in a timely manner below and accordingly are not appropriately presented to this Court for review. This Court "is without power to decide whether constitutional rights have been violated when the federal questions are not seasonably raised in accordance with the requirements of state law . . ." [*Eckman v. California*, 344 U. S. 357, 358 (1953).]

Questions Presented.

1. Does the California procedure allowing a dismissal of a petition for a writ of mandate, without first issuing an alternative writ of mandate, deny petitioners the equal protection of the law under the Fourteenth Amendment to the Constitution of the United States?

2. Does the construction by the California courts of the scope of a contractual consent to jurisdiction provision so as to include actions for fraud as well as actions in contract deprive petitioners of their rights under the due process clause of the Fourteenth Amendment to the Constitution of the United States?

3. Did California deny petitioners due process of law under the Fourteenth Amendment to the Constitution of the United States by not affording ample time to appear and defend an *in personam* action brought against them in the California courts?

4. Were petitioners deprived of due process of law under the Fourteenth Amendment to the Constitution of the United States by enforcing the covenants of a contract, to which petitioners were parties, providing that petitioners consented to the jurisdiction of the courts of California and stipulating the manner of effecting service upon them?

Counter-Statement of the Case.

A. The Proceedings Below.

1. *The Nature of the Action in the Trial Court.*

The action below was brought by Union Bank, the Real Party in Interest in this proceeding, against petitioners on three causes of action. The First Cause of Action, for declaratory relief, is on certain guaranties and agreements to purchase accounts receivable. The guaranties and agreements were executed by the petitioners in favor of Union Bank in connection with certain loans made by Union Bank to Aloha Corporation, a Colorado corporation, doing business as National Sales Research Company. The Second Cause of Action is on a promissory note executed by the petitioners in favor of Union Bank in the amount of $50,000.00. The Third Cause of Action asserts a claim based on a civil conspiracy, to which petitioners were parties, to defraud Union Bank in connection with the aforesaid loans to Aloha Corporation.

2. *The Service of Process Below.*

The complaint was filed on September 5, 1961. On the same date, copies of the summons and complaint were duly served on Bertram H. Ross, Esquire, of Los Angeles, California, as the designated agent of petitioners for service of process in the State of California. [Declaration of Bernard Reich, Ex. 3 to Answer to Petition for Writ.] On the same date, copies of the summons and complaint were also sent by registered mail to each of the petitioners at his home address outside the State of California. [Affidavit of Howard L. Friedman, Ex. 4 to Answer.]

The aforesaid service was accomplished pursuant to and in conformity with the provisions of paragraph 20 of a written contract dated April 9, 1961, to which McCaw and Wooten are parties. [Ex. B to the Complaint.] The pertinent provisions are quoted in the Petition herein at pages 4-6.

The foregoing provisions of the contract require a dual service; (1) service upon the designated agent (or one of the other methods of service specified in the agreement); (2) service by registered mail upon the petitioners. Service under the contract was not completed until both services were made. Accordingly, the final act of service was performed outside the County of Los Angeles when copies of the summons and complaint were received by the petitioners at their respective addresses.

3. *The Motion to Quash Service of Summons in the Trial Court.*

Petitioners moved in the trial court to quash the service of the summons on the ground that the trial court had no jurisdiction over the persons of the petitioners and, in the alternative, to dismiss the Third Cause of Action on the same ground. [Ex. 2 to the Answer to Petition.] On October 13, 1961, the trial court entered a minute order denying the motion in its entirety.

4. *The Petition for Writ of Mandate in the District Court of Appeal.*

Petitioners sought a writ of mandate from the District Court of Appeal, Second Appellate District, State of California, commanding the respondent court to quash the aforesaid service of summons or, in the alternative, to dismiss the Third Cause of Action. Said

petition did not attach as exhibits or otherwise any part of the record made in the trial court. However, the real party in interest, in its answer to said petition, attached as exhibits thereto the complaint in the trial court [Ex. 1], the motion to quash or to dismiss [Ex. 2], the declaration of Bernard Reich in support of the motion [Ex. 3], and the affidavit of Howard I. Friedman in opposition to the motion to dismiss or quash. [Ex. 4.] Said exhibits comprise substantially the entire record before the trial court, and said exhibits were before the District Court of Appeal in connection with its consideration of the petition. Petitioners filed with said petition for writ of mandate a memorandum of points and authorities in support thereof, which fully briefed the merits of said petition. The real party in interest filed with said District Court of Appeal a memorandum of points and authorities thoroughly briefing the opposition to said petition for writ of mandate. With the foregoing briefs and trial court record before it, the District Court of Appeal, on December 2, 1961, entered its order denying the petition for writ of mandate. The District Court of Appeal did not issue an alternative writ of mandate prior to its denial of said petition.

5. *The Petition for Hearing in the California Supreme Court.*

Petitioners sought a hearing before the California Supreme Court. On November 29, 1961 said Court denied a hearing.

B. The Manner in Which the Alleged Federal Questions Were Raised Below.

1. *The Equal Protection Question.*

The claim that the California courts have in effect denied the right of review to petitioners in violation of the equal protection clause of the Fourteenth Amendment could not and was not raised in the trial court. The claim stems from the denial by the District Court of Appeal of the petition for writ of mandate without first issuing an alternative writ. [Petition, p. 14.] Under California practice, the asserted Federal question could not have been and was not raised in the District Court of Appeal by way of a motion for rehearing because such a motion does not lie under such circumstances. [Rules 24(a) and 27 of the Rules on Appeal.] Accordingly, the first opportunity available to petitioners for raising the asserted Federal question was in their petition for hearing by the Supreme Court of California. In said petition, petitioners asserted that they were "entitled as a matter of statutory right to the alternative writ". [Petition for Hearing, p. 10.] They relied upon California statutory provisions and judicial decisions in making said contention. The only reference to a constitutional right to an alternative writ was contained in the statement that "serious constitutional questions would arise if petitioners were not entitled to full review of the order of Respondent." [*Id.* at 10.] There is nothing in said petition for hearing by the state Supreme Court identifying the character of the "constitutional question" or, for that matter, any

identification of whether or not the constitutional question would arise under the California Constitution or the Constitution of the United States. Of course, no Federal question is raised by an allegation of "unconstitutionality" that fails to invoke expressly the Constitution of the United States. [*Kipley v. Illinois*, 170 U. S. 182 (1898).] The first time that petitioners identified the precise character of the constitutional question occurred in their Petition for Certiorari in this Court where they declared that the action of the District Court of Appeal in denying the alternative writ constituted a discriminatory application of the right of appeal which had the effect of depriving them of the equal protection of the laws under the Fourteenth Amendment.

2. *The Claim That Petitioners Have Not Consented to California Jurisdiction in Tort Actions.*

In the trial court, petitioners claimed that the contractual consent provision did not embrace the subject matter of the Third Cause of Action, which is a claim for fraud. There is nothing in their Motion to Quash as filed in the trial court or in the supporting memorandum of points and authorities suggesting that a Federal, or for that matter a State, constitutional question was involved.

Similarly, in their petition for a writ of mandate in the District Court of Appeal, petitioners again rested their contentions and their claim with respect to the Third Cause of Action upon the assertion that the contractual consent did not embrace the subject matter of said cause of action. [Petition for Writ of Mandate, pp. 8-11.] There is nothing in said petition or in the supporting memorandum of points and authorities sug-

gesting that constitutional questions arising under the Constitution of the United States were involved.

In the petition for hearing by the Supreme Court of California, the same pattern emerges. Petitioners again claimed that the scope of the contractual consent provision did not embrace the subject matter of the Third Cause of Action. It was not suggested that constitutional questions arising under the Constitution of the United States were involved. [Petition for Hearing, pp. 17-20.]

It was not until petitioners filed their Petition for Certiorari in this Court that they asserted with clarity that the assumption of jurisdiction of the Third Cause of Action deprived them of rights under the Fourteenth Amendment to the Constitution of the United States. [Petition, p. 14.]

3. *The Question of Adequate Notice to Appear and Defend.*

In the trial court, petitioners claimed that they were afforded only ten days within which to appear and defend the action and asserted that a ten day period was not sufficient time to satisfy "the constitutional objective of due process." Again petitioners did not identify whether or not the constitutional requirement stemmed from the California Constitution or from the Constitution of the United States. The cases upon which petitioners relied in the trial court with respect to this question included decisions of this Court.

In their petition for a writ of mandate in the District Court of Appeal, petitioners claimed a violation of their "constitutional rights". [Petition for Writ of Mandate, para. 8.] They argued further that they were a-

forded only a ten day period to appear and defend and asserted that said period was not sufficient to meet the requirements of due process. Petitioners again failed to identify whether the asserted constitutional question stemmed from the California Constitution or the Constitution of the United States.

In their petition for hearing by the state Supreme Court, petitioners proceeded on exactly the same theory as in the District Court of Appeal and again failed to identify the constitutional question involved with respect to the United States or California Constitutions. [Petition for Hearing, pp. 12-16.]

In their Petition for Certiorari, for the first time, petitioners clearly identified the Fourteenth Amendment to the Constitution of the United States as being the basis for the asserted constitutional question. [Petition, p. 20.]

4. *The Question of the Validity of a Contractual Consent to Jurisdiction Provision.*

In the trial court, petitioners made no constitutional argument whatever with respect to the validity of the contractual consent provisions and the manner of effecting service thereunder. The claim in the trial court was that such a contractual provision "is against the public policy of the State of California."

In their petition for a writ of mandate in the District Court of Appeal, petitioners claimed that "their constitutional rights" were violated [Petition, para. 8] but failed to identify which Constitution—California or the

United States—was involved. In their attack upon the contractual consent provisions, they again urged that the provisions were invalid as a violation of "the public policy of the State of California" [Memorandum of Points and Authorities, p. 2.]

The same position was taken by petitioners in their petition for hearing by the California Supreme Court in which petitioners asserted that "it is against the public policy of the State of California for the Courts of this State to assert jurisdiction over non-residents simply because of their prior consent." [Petition for Hearing, p. 10.]

It was not until their Petition for Certiorari in this Court that petitioners raised clearly the claim that a contractual consent to jurisdiction violated petitioner's rights under the Fourteenth Amendment to the Constitution of the United States.

ARGUMENT.

I.

There Is No Colorable Substance to the Claim That Petitioners Have Been Denied the Equal Protection of the Law as a Consequence of the Decision of the District Court of Appeal Denying Their Petition for a Writ of Mandate Without First Issuing an Alternative Writ of Mandate. Accordingly, There Are No Special or Important Reasons Justifying the Exercise by This Court of Its Power of Discretionary Review With Respect to That Question.

Under California practice, an order denying a motion to quash service of summons and process is normally reviewable by an application for a writ of mandate addressed to an appropriate appellate court. [Cal. Code Civ. Proc., §416.3]. A petition for a writ of mandate is considered an original proceeding in the appellate court and is governed by the provisions of California Code of Civil Procedure, §1084 *et seq.* and by Rule 56 of the Rules on Appeal. The alternative writ of mandate has the effect of an order to show cause why a peremptory writ should not be granted, and normally provides a return date for the hearing on the peremptory writ. [*Id.* §1087].* The peremptory writ may be issued in the first instance or it may be preceded by the issuance of the

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*Section 1087 provides:

"The writ may be either alternative or peremptory. The alternative writ must command the party to whom it is directed immediately after the receipt of the writ, or at some other specified time, to do the act required to be performed, or to show cause before the court at a specified time and place why he has not done so. The peremptory writ must be in a similar form, except that the words requiring the party to show cause why he has not done as commanded must be omitted and a return-day inserted."

alternative writ. [*Id.* §1088.] Moreover, it is well established in California practice that the writ may be denied without the issuance of the alternative writ. [*E.g., Funeral Dir. Ass'n v. Bd. of Funeral Dirs.*, 22 Cal. 2d 104, 136 P. 2d 785 (1943); *Trabue Pittman Corporation v. Board of Supervisors*, 49 Cal. App. 2d 463, 121 P. 2d 746 (1942); *Tingley v. Superior Court*, 8 Cal. App. 47, 48, 96 Pac. 20 (1908); Rule 24(a) of Rules on Appeal.]

In either event, the Court will have had before it the petition, a supporting brief and such opposition papers as the respondent and the real party in interest may desire. The denial without issuance of the alternative writ may be motivated by the Court's conviction that the petition is without merit or that a proper case for the exercise of the discretion inherent in the Court has not been presented or that the petitioner has failed to provide in the petition an adequate record disclosing the proceedings in the trial court, or that the petitioner has not justified his commencement of the mandate proceedings in the particular appellate court selected. [*E.g. Funeral Dir. Assn. v. Bd. of Funeral Dirs.*, 22 Cal. 2d 104, 136 P. 2d 785 (1943).] Assuming that the denial is motivated by a determination that the petition is without merit, the only practical difference between a denial of the petition before issuance of the alternative writ and a denial after issuance of the alternative writ is that, in the latter case, oral argument on the merits normally occurs. In either instance, there has been appellate review and an opportunity for the appellate court to consider the matter fully on its merits.

As we have seen, the District Court of Appeal, with a full record before it, denied the petition for a writ o

mandate. It did so without first issuing an alternative writ of mandate. Petitioners insist that said denial deprived them of the right of appellate review, thereby compromising their constitutional rights. [Petition, p. 12.] They ignore the fact that the issuance of the alternative writ under California practice is not a condition of the existence of the right of review. The review was afforded in connection with the denial of the petition, irrespective of the alternative writ. The gravamen of petitioners' complaint is that the California Courts, by not issuing an alternative writ, have deprived them of the opportunity for oral argument. The fact that California has indeed provided petitioners with appellate review is the complete answer to petitioners' claim; but, as we shall now see, even if the denial of the alternative writ were construed as having the effect of denying petitioners review, no constitutional question would be presented.

A. Due Process of Law Does Not Require California to Provide Appellate Review.

It is elementary that due process "does not comprehend the right of appeal" [*District of Columbia v. Clawans*, 300 U. S. 617, 627 (1937); see also *National Union of Marine Cooks v. Arnold*, 348 U. S. 37, 43 (1954); *Reetz v. Michigan*, 188 U. S. 505, 508 (1903); *McKane v. Durston*, 153 U. S. 684, 687 (1894)]. It is equally familiar that due process does not require California to allow oral argument to petitioners in connection with any appellate review which it might make available to them. [*Price v. Johnston*, 334 U. S. 266, 285 (1948)].

B. California Has Not Discriminated Against Petitioners With Respect to the Availability of Appellate Review.

We recognize, of course, the principle that, while appellate review need not be made available by a State, the State must make it available on a nondiscriminatory basis if it makes appellate review available at all. [*E.g., Smith v. Bennett*, 365 U. S. 708 (1961); *Burns v. Ohio*, 360 U. S. 252 (1959); *Griffin v. Illinois*, 351 U. S. 12 (1956); *Dowd v. United States*, 340 U. S. 206 (1951)]. That California has done. There is no showing whatever that the California procedure with respect to petitions for writ of mandate does not operate in the same manner for all persons similarly situated. If all persons in California situated similarly to petitioners are treated the same with respect to the procedural rules governing petitions for writ of mandate, the constitutional requirement is satisfied. [*Ohio ex rel. Bryant v. Akron Metrop. Pk. Dist.*, 281 U. S. 74, 81 (1930).] The fact that, procedurally, a petition for a writ of mandate is treated as an original proceeding in the appellate court and may be denied without the issuance of an alternative writ of mandate or an order to show cause—in contrast to procedure governing other types of appellate review in different cases—does not constitute an unreasonable classification. The Fourteenth Amendment does not require a State to "adopt a unifying method of appeals . . ." [*Ibid.*]

Petitioners contend that the decision below conflicts with *Griffin v. Illinois*, 351 U. S. *supra*, and *Dowd v. United States*, 340 U. S. *supra* [Petition, p. 13]. The contention reveals a gross misapprehension of the teaching of those cases. *Griffin* involved no more than a determination that the administration of the Illinois statute governing availability of trial court transcripts

in non-capital felony appeals made it impossible, as a practical matter, for indigent appellants to secure appeal. In short, *Griffin* stands for the proposition that a State may not provide appeal for those who can afford it and deny appeal to those who cannot. The same principle is found in *Smith v. Bennett*, 365 U. S. *supra*, and *Burns v. Ohio*, 360 U. S. *supra*. *Dowd v. United States*, 340 U. S. *supra*, also involved a discriminatory denial of the right to appeal in which state prison authorities prevented a prisoner from sending out appeal documents until it was too late to take a proper appeal. The holding was that Indiana in that case had prevented respondent from resorting to the type of appeal generally afforded by Indiana to persons convicted of crime.

The record here is silent and petitioners are silent in spelling out the elements of discrimination in the California practice of which they complain. That silence is fatal to their contention that California has denied them the equal protection of the law.

C. The Constitutional Question Assertedly Involved Was Not Raised in a Timely Manner Below.

It was of course incumbent upon petitioners to assert their claim of unconstitutional State action in the California courts at the earliest opportunity. [*E.g.*, *Johnson v. New York Life Insurance Co.*, 187 U. S. 491, 495 (1902).] Their first opportunity to do so occurred in their petition for a hearing in the California Supreme Court. As we have seen, that petition asserted that petitioners were entitled "as a matter of statutory right" to the issuance of an alternative writ. [Petition for Hearing, p. 10.] The only hint at a constitutional question was their statement that "serious constitutional questions would arise" if pettitioners

were not entitled to an alternative writ. [*Ibid.*] The failure to identify precisely the character of the constitutional objection and the added failure to identify which Constitution—California or the United States—was involved precludes petitioners from raising the question for the first time in this Court [*E.g. Lawn v. United States*, 355 U. S. 339, 362 (n. 16) (1958)].

II.

The Asserted Constitutional Question Involving the Construction of the Scope of the Contractual Consent to Jurisdiction so as to Include Actions for Fraud Involves Only a Question of a State Court's Decision of Local Law. Such Federal Implications as May Also Be Present Were Not Required to Support the Decision of the State Court and in Any Event Do Not Involve Questions of Such Importance as to Justify the Exercise by This Court of Its Discretionary Power of Review.

Petitioners assume that the contractual consent contained in the April 9, 1961 agreement is limited to "contract" actions. [Petition, p. 16.] On that premise, they contend that California does not have jurisdiction over their persons in connection with the subject matter of the Third Cause of Action because that cause of action sounds in tort, not contract.

First: Paragraph 20 of the April 9, 1961 agreement embraces actions "arising out of any loan or guaranty transaction heretofore made by or between Union and any of the named parties." Whether or not Petitioners consented to California jurisdiction with reference to the subject matter of the Third Cause of Action turns on the construction of the language "arising out of any loan or guaranty transaction." The decision below up-

holding California jurisdiction over the Third Cause of Action could have been based—and indeed we so argued to the California courts—on the construction that the word "transaction" embraces the full factual context of any loan made by the bank to any of the parties, thereby embracing actions both in contract and in tort relating to the same facts. [See *Marr v. Superior Court*, 30 Cal. App. 2d 275, 86 P. 2d 141 (1939); *Kane v. Mendehall*, 5 Cal. 2d 749, 56 P. 2d 498 (1936); Cal. Code Civ. Proc., §427.]. Manifestly, if petitioners, by a fair construction of the document, consented to the jurisdiction of the California courts in connection with the subject matter of the Third Cause of Action, California cannot be charged with having asserted jurisdiction over them in the absence of their consent. Such a construction is dispositive of petitioners' claims in this regard.

The construction of the terms of the April 9, 1961 contract is wholly a question of local law. It is immaterial whether the State court was right or wrong with respect to said determination. An erroneous decision of a question of local law raises no Federal question; and this Court is without power to review such a decision. [*Tracy v. Ginzberg*, 205 U. S. 170, 177-78 (1907); *Central Land Co. v. Laidley*, 159 U. S. 103, 112 (1895); *McDonald v. Oregon Navig. Co.*, 233 U. S. 665, 669-70 (1914).]

Second: If petitioners are properly before the respondent court on the first two causes of action as a consequence of the consent and designation of agent provisions of the contract,* they cannot be heard to

*For purposes of the petition for a writ commanding dismissal of the Third Cause of Action, this is necessarily conceded by petitioners.

complain with reference to the Third Cause of Action, even if the scope of the contractual consent did not embrace the subject matter of that cause of action. Having once been properly brought before the California courts by consent, petitioners, like all other defendants, are subject to the procedural rules adopted by California for civil actions. So long as the Third Cause of Action is properly joinable with the first two causes of action (and petitioners, in effect, concede that, under §427 of the Code of Civil Procedure, it is), the Third Cause of Action cannot be properly dismissed.

The point is illustrated by *Adam v. Saenger*, 303 U. S. 59 (1938). A Texas corporation, not qualified in California, brought suit in California. The defendant filed a cross-complaint and served the attorney for the Texas corporation. Judgment was entered by default in favor of the cross-complainant. The Texas courts dismissed a suit brought on the judgment on the ground that the California courts did not have *in personam* jurisdiction over the Texas corporation and that the service upon the company's California attorney did not confer such jurisdiction. The Supreme Court of the United States reversed and held that the Texas courts had failed to give full faith and credit to the California judgment. The reasoning of this Court is most instructive:

> "There is nothing in the Fourteenth Amendment to prevent a state from adopting a procedure by which a judgment *in personam* may be rendered in a cross-action against a plaintiff in its courts, upon service of process or of appropriate pleading upon his attorney of record. The plaintiff having, by his voluntary act in demanding justice from the defendant, submitted himself to the juris-

diction of the court, there is nothing arbitrary or unreasonable in treating him as being there for all purposes for which justice to the defendant requires his presence." [303 U. S. at 67-68.]

See also *Western Life Indemnity Co. v. Rupp*, 235 U. S. 261, 271-2 (1914) where this Court held that "a State, without violance to the 'due process' clause of the Fourteenth Amendment, may declare that one who voluntarily enters one of its Courts to contest any question in an action there pending shall be deemed to have submitted himself to the jurisdiction of the Court for all purposes of the action. . . . ."

By a parity of reasoning, the same conclusion applies here. Petitioners having properly subjected themselves to the jurisdiction of the California courts with reference to the first two causes of action, due process is not offended by imposing upon petitioners the same procedural rules which apply to all civil actions in California. Included among those rules is Section 427 of the Code of Civil Procedure relating to joinder of causes of action.

The principle can be demonstrated most simply by assuming that a voluntary general appearance were made by petitioners in a suit confined to the first two causes of action. It is, of course, axiomatic that a voluntary general appearance by a nonresident confers *in personam* jurisdiction upon the court. [*E.g. Harrington v. Superior Court*, 194 Cal. 185, 228 Pac. 15 (1924); Cal. Code Civ. Proc. §416.] It has never been suggested or held that under such circumstances the plaintiff could not constitutionally amend his complaint thereafter, pursuant to Section 472 of the Code of Civil Procedure, to add a properly joinable Third

Cause of Action. The situation from a constitutional point of view is no different where the appearance is made as a consequence of a contractual consent entered into in advance of the commencement of the action. That is precisely the situation here.

The foregoing involves the application of familiar principles of procedure. No unsettled question of law is presented and, accordingly, no reason appears for review by this court.

Third: As we have already seen, petitioners did not raise the constitutional point sought to be invoked with respect to this reach of the case until they filed their petition in this Court. For reasons already indicated (see pp. 16-17, *supra*) no constitutional question is properly before this Court.

III.

There Is No Federal Question Involved in the Decision of the California Court That Petitioners Were Given Adequate Notice to Appear and Defend the Action. That Decision Can Be Rested on the Wholly State Ground That a Thirty Day Period Was Provided Under California Law Rather Than the Ten Day Period Upon Which Petitioners Rest Their Claim. In Any Event, and Even if a Ten Day Period Were Involved, No Substantial Federal Question Is Raised Warranting the Intervention of This Court Through Its Discretionary Power of Review.

Petitioners contend that they were permitted but ten days under California law to appear and defend the action in the trial court. [Petition, p. 21.] Such period, they say, does not afford reasonable notice to them to

appear and defend; accordingly it impinges upon their rights under the due process clause of the Fourteenth Amendment.

First: We argued in the California courts—and it cannot be assumed that such argument was not the basis of the decision below—that the applicable time period under California law was thirty days rather than ten. Since the California decision could have been predicated upon the availability of a thirty day period, the reasonableness of the time period must be determined in terms of a thirty day period. The California decision with respect to the applicable time period involves a question wholly of local law over which this Court has no review power. Petitioners have not attacked the reasonableness of a thirty day period.

Second: Even if the applicable period within which petitioners are required to defend were ten days instead of thirty, ample notice and opportunity to appear and defend is thereby afforded. Hence, the requirements of due process under the Constitution of the United States are satisfied. Those requirements involve nothing more than affording a defendant reasonable notice of the pendency of an action and ample time within which to appear and defend. [*E.g. Mullane v. Central Hanover B. & T. Co.*, 339 U. S. 306, 314 (1950).] Petitioners, in effect, concede that the method of service utilized afforded them actual notice of the proceedings. Their sole attack is based upon the assertion that a ten day period does not provide adequate time to appear and defend. With modern methods of communication and travel, a ten-day period is manifestly sufficient. In any event, it is no more insufficient for a nonresident individual defendant than

for a resident defendant or a nonresident corporate defendant whose agent in California is served. If petitioners are right that the ten-day period is unconstitutional, it must follow that it is unconstitutional in those situations as well. There is nothing in the petition supporting in the slightest such a conclusion either on the basis of controlling authorities or on the basis of reasoned argument.

Third: The sole support for the remarkable contention that a ten-day period is unconstitutional is provided by a tortured reading of *Roller v. Holly*, 176 U. S. 398 (1900) and *Goodrich v. Ferris*, 214 U. S. 71 (1909). [Petition, pp. 21-22.] In *Roller*, this Court held that a five-day period for a Virginia defendant to appear in a Texas action was not sufficient "under the circumstances of this case, and considering the distance between the place of service and the place of return." [176 U. S. at 413.] In *Goodrich*, this Court upheld the ten-day provision provided under the California Civil Code provisions formerly controlling probate administration. This Court, in *Goodrich*, distinguished *Roller*, among other grounds, on the ground that *Roller* involved original process while *Goodrich* did not. Petitioners infer that, had *Goodrich* likewise involved original process, this Court would have held that the ten-day period was unconstitutional. There is not the slightest suggestion in *Goodrich* that a ten-day period in a case involving original process is unconstitutional. Moreover, *Goodrich* in its holding sustains a ten-day period. No case has held or suggested what petitioners contend—namely, that a ten-day period in a case involving original process is unconstitutional. In the absence of such a holding, petitioners' contention collapses.

IV.

The Validity of Contractual Consent to Jurisdiction Provisions Is so Well Established That No Ground Exists for the Exercise by This Court of Its Discretionary Power of Review Over the Decision of the California Court Upholding Said Provisions.

Petitioners concede that the available authorities have upheld the validity of contractual consent provisions such as those involved in this case. [Petition, p. 24.] Their principal contention is that this Court has never so decided and that the matter is of such importance that it should be decided by this Court.

First: This Court has consistently recognized that consent of a nonresident to the jurisdiction of a foreign court confers valid *in personam* jurisdiction, consistent with the due process clause of the Fourteenth Amendment. [*E.g. Western Life Indemnity Co. v. Rupp*, 235 U. S. 261 (1914); *Louisville & N. R. Co. v. Schmidt*, 177 U. S. 230, 237 (1900).] This Court has also repeatedly upheld the validity of service of process on a non-resident by serving a designated agent of the nonresident within the foreign state. [*E.g. Perkins v. Benguet Consol. Min. Co.*, 342 U. S. 437 (1952).] In similar fashion, it has become elementary constitutional law that a non-resident individual doing business in the foreign state through agents subjects himself to service of process upon said agents in connection with claims stemming from the transaction of business in the foreign state. [*Doherty & Co. v. Goodman*, 294 U. S. 623 (1935); *Sugg v. Hendrix*, 142 F. 2d 740 (5th Cir., 1944).]

The rationale of *Doherty* substantially controls the present question. In that case, the nonresident was

found by this Court not to have consented in terms to service of process on his agent in the foreign state. Nevertheless this Court held that the Iowa statute provided for an involuntary appointment by the nonresident of the agent as an agent for service of process. *A fortiori,* where the nonresident voluntarily and without the compulsion of statute designates an agent for service of process in the foreign state, as in this case, the validity of the designation and the consensual submission to jurisdiction is overwhelming. This Court has even recognized that the Fourteenth Amendment permits a State to convert a voluntary special appearance to challenge jurisdiction into an involuntary general appearance in the case. [*York v. Texas,* 137 U. S. 15 (1890).]

The constitutional propriety of the voluntary designation of an agent for service of process by an individual is recognized by Rule 4(a)(1) of the Federal Rules of Civil Procedure, which provides that service may be accomplished "by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process." "No question of due process arises with respect to service upon an agent of an individual in such a situation." [2 Moore, Federal Practice §4.12, (2d Ed. 1960).] The Federal courts have repeatedly upheld the validity of service upon an agent for service of process voluntarily appointed by an individual. [*E.g. Emerson Radio & Ph. Company v. Callander Distrib. Corp.,* 116 Fed. Supp. 926, 927 (S. D. N. Y. 1953) ("In fact, the provision is perfectly proper for it is no more than a consent to the appointment of an agent for the service of process in New York. And such agreements have been sustained consistently."); *Davis v. Smith,*

126 Fed. Supp. 497 (E. D. Pa. 1954), aff'd 253 F. 2d 286, 289 (3rd Cir. 1958); *Kenny v. Alaska Airlines*, 132 Fed. Supp. 838, 843 (S. D. Cal. 1955).]

Second: Contractual consent provisions have been uniformly upheld in all jurisdictions where the issue has been raised. We have been unable to find a single case that has questioned in the slightest the validity of such provisions. The controlling case in California is *Frey & Horgan Corp. v. Superior Court*, 5 Cal. 2d 401, 55 P. 2d 203 (1936) cert. den. 298 U. S. 684 (1936). [See also *Mulcahy v. Whitehall*, 48 Fed. Supp. 917, 919 (D. Mass. 1943); *Gilbert v. Burnstine*, 255 N. Y. 348, 174 N. E. 706 (N. Y. Ct. App. 1931); *Withers v. Starace*, 22 Fed. Supp. 773 (E. D. N. Y. 1938); *Marvlo Fabrics, Inc. v. Jarus*, 87 Fed. Supp. 245 (W. D. Mo. 1949).]

Third: The Restatement of Judgments and the Restatement of Conflict of Laws unqualifiedly recognize the validity of contractual consent provisions.* The authoritative text-writers are uniformly in accord. "A person may consent in advance to jurisdiction of the

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*The *Restatement of Judgments* expresses the controlling principles as follows:

"§18. CONSENT.

"A court may acquire jurisdiction over an individual if he consents to the exercise of jurisdiction over him.

"Comment:

* * * *

"c. Consent before action brought. A person may agree that if an action is brought against him the court shall have jurisdiction over him, even though he is not served with process in the action. Thus, in a contract made between the plaintiff and the defendant it may be provided that in any action brought upon the contract in a particular State service of process may be made upon the defendant in a manner provided for by the terms of the contract, as, for example, by mail or by service outside the State in which the action is brought. In such a case if service is made in the manner

Courts in a State where he is not present or domiciled." [Goodrich, Conflict of Laws, p. 198 (3d Ed. 1949); Stumberg, Conflict of Laws, p. 81 (2d Ed. 1951).]

Fourth: By hypothesis, jurisdiction of the California courts over petitioners was acquired by their consent. That being the case, no question of due process is involved because California has not sought to assert its jurisdiction over petitioners involuntarily. Due process in this context involves the involuntary deprivation of rights or property. Where the deprivation is voluntary, no question of due process properly arises.

Fifth: As we have already seen, petitioners deferred until now any claim under the Fourteenth Amendment to the Constitution of the United States with reference to the validity of the contractual consent

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agreed upon, it is sufficient to subject the defendant to the jurisdiction of the court.

"d. Designation of agent to accept service of process. A person may designate an agent upon whom service of process may be made in any action which may be brought against him . . . If he does appoint such an agent, service of process upon the agent subjects him to the jurisdiction of the court."

The *Restatement of Conflict of Laws* contains similar provisions:

"§81. JURISDICTION BY CONSENT.

"A state can exercise through its courts jurisdiction over an individual who consents to such exercise of jurisdiction.

"Comment:

* * * *

"b. Consent may be given with respect to a particular action either after the action has been brought or before the action has been brought; or it may be given generally with respect to actions which may thereafter be brought."

provisions. For reasons already noted [See pages 16-17, *supra*] they may not now ask this Court to review the California decision on constitutional grounds.

Conclusion.

The petition for writ of certiorari should be denied.

Respectfully submitted,

LOEB AND LOEB,
HOWARD I. FRIEDMAN,
Attorneys for Real Party in Interest.

MICRO C

TRADE MA

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CARD 20

RK ®

MATTHEW BENDER & COMPANY

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